IN THE

Supreme Court of the United States

October Term, 1974.

No. 73-1765.

SYLVIA MEEK, BERTHA G. MYERS, CHARLES A. WEATHERLEY, AMERICAN CIVIL LIBERTIES UNION, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, PENNSYLVANIA JEWISH COMMUNITY RELATIONS COUNCIL and AMERICANS FOR SEPARATION OF CHURCH AND STATE,

Appellants,

v.

JOHN C. PITTENGER, as Secretary of Education of the Commonwealth of Pennsylvania, and GRACE M. SLOAN, as Treasurer of the Commonwealth of Pennsylvania,

Appellees,

and

JOSE DIAZ and ENILDA DIAZ, His Wife, et al.,

Intervening Parties Appellees.

On Appeal From the United States District Court for the Eastern District of Pennsylvania.

REPLY BRIEF FOR APPELLANTS.

WILLIAM P. THORN,
12th Floor, Packard Building,
Philadelphia, Pa. 19102
(215) LO 9-4000

LEO PFEFFER,
15 East 84th Street,
New York, N. Y. 10028
(212) 879-4500

Attorneys for Appellants.

International Printing Co., 711 So. 50th St., Phila., Pa. 19143 — Tel. (215) 727-8711

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ARGUMENT.

Introduction.

The brief of the appellees makes the following arguments.

1. The legislative purpose was secular.

2. The services and materials mandated by the acts are secular in nature and thus do not aid religion.

3. The acts do not involve the State in prohibited entanglement with religious organizations.

4. Appellants failed to offer evidence to prove that the acts had a primary effect of aiding religion and that they involve the State in forbidden relationships with religious organizations.

We will reply to the arguments in the above order.

1. For the Purpose of Argument, Appellants Concede That the Acts Involved Serve a Secular Legislative Purpose.

The two statutes involved contain a recital of a secular purpose. Inasmuch as this Court has generally accepted such a recital at face value, appellants have not taken issue with it and for the purpose of argument, concede that the legislative purpose was secular.

In the court below appellees devoted considerable time in producing testimony to the effect that the services and materials provided by the statutes here involved are of great benefit to students and essential to a modern secondary school. Both groups of intervener appellees emphasize this in their briefs. (*Diaz et al.* at page 15 and *Chesik et al.* at pages 10, 11.) This too is conceded by appellants. But, by the same token, whether called "auxiliary" or not, they are educational services, and thus subject

to the principles applied in *Lemon v. Kurtzman*, 403 U. S. 602 (1971) and *Earley v. DiCenso*, 403 U. S. 602 (1971) and their progeny. Nothing in the First Amendment distinguishes between auxiliary and non-auxiliary educational services.

2. The Services, Textbooks, Equipment and Materials Furnished to Nonpublic Schools Pursuant to Acts 194 and 195 Aid Religion.

In 1972 the State of Illinois adopted legislation to provide auxiliary services, textbooks and equipment for nonpublic schools. In holding the legislation to be unconstitutional the Illinois Supreme Court quoted from *Sloan v. Lemon*, 413 U. S. 825, —, 37 L. Ed. 2d 939, 945, 93 S. Ct. 2982, 2986-2987:

> "The State has singled out a class of its citizens for a special economic benefit. Whether that benefit be viewed as a simple tuition subsidy, as an incentive to parents to send their children to sectarian schools, or as a reward for having done so, at bottom its intended consequence is to preserve and support religion-oriented institutions. We think it plain that this is quite unlike the sort of 'indirect' and 'incidental' benefits that flowed to sectarian schools from programs aiding all parents by supplying bus transportation and secular textbooks for their children. Such benefits were carefully restricted to the purely secular side of church-affiliated institutions and provided no special aid for those who had chosen to support religious schools. Yet such aid approached the 'verge' of the constitutionally impermissible. Everson v. Board of Education, 300 U. S. 1, 16 (1947)".

Klinger v. Howlett, 56 Ill. 2d 1 at 9, 305 N. E. 2d 129 at 133.

The acts here involved recite the fact that the services, textbooks, equipment and instructional materials are part

of the public school program. School administrators called as witnesses by appellees emphasized the fact that the services, equipment and materials were essential ingredients in a modern secondary educational institution. This contradicts the argument of appellees that the so-called "auxiliary services" provided by Act 194 are not part of the regular school program, and therefore, provide merely incidental secular benefits to sectarian schools.

Appellees Diaz et al. called Dr. D. A. Horowitz, Associate Superintendent for Schools and Special Services in the School District of Philadelphia, as a witness. At page A74 of the Appendix we have the following question to Dr. Horowitz and his answer:

> "Q. Now, respecting the auxiliary services under Act 194, have you formed an opinion as to the value, a professional opinion as to the value, of these services to children?
>
> A. I can only judge it in this way, that the auxiliary services that have been enjoyed by pupils in public schools, the schools that I know best, that these services are important to them, to their development, to their education process, to their future vocation, and I can I think fairly assume that they would be just as valuable to any children enrolled in any schools."

See also, Dr. Horowitz's testimony at page A76 and A77 and the testimony of J. Jarvis at pages A109 and A110 of the Appendix.

As Judge Higginbotham pointed out in his dissent (JS 64a) "the sums allocated by the Commonwealth for the implementation of Acts 194 and 195 can by no means be regarded as insubstantial or insignificant." To implement the acts, Pennsylvania appropriated about $31,000,000 for the school term 1972-73 and about $35,000,000 for the school term 1973-74.

Predictably, in 1974 the General Assembly increased the allowance for textbooks under Act 195 from $10.00 to $12.00 per pupil for the school year 1973-74 and to $15.00 per pupil for the school year beginning July 1, 1974. It also increased the allowance for auxiliary services under Act 194 from $30.00 to $36.00 per pupil for the school year beginning July 1, 1974.[1] As Chief Justice Burger said in the first *Lemon* case:

> "Here we are confronted with successive and very likely permanent annual appropriations which benefit relatively few religious groups. Political fragmentation and divisiveness on religious lines is thus likely to be intensified." *Lemon v. Kurtzman,* 403 U. S. 602 at 623.

3. Entanglement of the State With Religion Is Inherent in the Pennsylvania Statutes.

Appellees argue that the fact that the services, equipment and materials are furnished by Intermediate Units[2] rather than by cash payments to the nonpublic schools eliminates the constitutional infirmity of entanglement. The acts were obviously designed in an attempt to avoid the problem in *Lemon v. Kurtzman, supra,* where the court condemned financial aid paid directly to church-related schools. See also *Waltz v. Tax Commissioner,* 397 U. S. 664 at 675:

> "Obviously a direct money subsidy would be a relationship pregnant with involvement and, as with most

1. Acts Nos. 169 and 170 of 1974, approved July 18, 1974, Purdons Pennsylvania Legislative Service, pp. 472, 473.

2. There are 29 such units in the Commonwealth and each school district is assigned to a unit. The units provide local schools with such services as curriculum development, instructional improvement services, management services, etc. Act No. 120 of 1970, 24 P. S. § 9-951 et seq. (pocket part).

> governmental programs, could encompass sustained and detailed administrative relationships for enforcement of statutory or administrative standards. . . ."

We fail to see where there is any substantial difference between furnishing services and equipment in kind and providing the schools with the cash to purchase them. The effect is exactly the same.

Furthermore, furnishing services and materials involves the State in a great deal more entanglement with the sectarian schools than simply paying cash to them.

We have described the procedure established by the Pennsylvania Department of Education for nonpublic schools to obtain the account for services and materials under Acts 194 and 195 in our initial brief, and we will not repeat them here. If the defendants fulfill their duty to the taxpayers, the entanglement will be pernicious. It is not enough for the state to issue instructions to nonpublic schools cautioning them against using any of the services or materials to further religious purposes, the state must make sure that the instructions are carried out. "The State must be certain given the Religion Clauses, that subsidized teachers do not inculcate religion. . . ." *Lemon v. Kurtzman, supra,* at 619.

Appellees *Diaz et al.* called several school teachers and administrators who testified that they understood that the programs could not be used for any religious purpose. The court below alluded to this. It said:

> "There is no evidence whatever that the presence of therapists in the schools will involve them in the religious missions of the schools. . . ." (JS 39a)

The testimony of five school employees selected by the parties to this action can hardly guarantee that the hundreds of such employees will abide by directives against

introducing religion into the programs. It would be impossible to examine all of the people involved in delivering the services and using the materials. Appellants saw no point in cross-examining carefully selected witnesses produced by the other parties. As this court stated in *Levitt v. Committee for Public Education*, 413 U. S. 472, the potential for conflict with the First Amendment "inheres in the situation" and "the State is constitutionally compelled to assure that the state-supported activity is not being used for religious indoctrination." (Citing *Lemon v. Kurtzman, supra*, 403 U. S. at 617, 619.) The testimony of appellees' witnesses on this issue was immaterial, as is evidenced by the fact that exactly the same type of trial testimony was presented, and in fact accepted by the Court in *Earley v. DiCenso*. See 403 U. S. at 618-619.

The District Court in *Public Funds for Public Schools of N. J. v. Marburger* spoke of the inherent nature of religious influence involved in sending public employees into religious schools in the following words:

> "Moreover, it is clear that the teachers providing such auxiliary services will be functioning within the confines and environment of a given religious institution where a religious atmosphere may be pervasive. Although the teachers of auxiliary services are not employed by a religious organization and are not directly subject to the direction and discipline of a religious authority, they will, nonetheless, be working in atmospheres dedicated to the rearing of children in a particular religious faith. Again it would seem that a constant review of that instruction would be required in order to determine that the religious atmosphere has not caused religion to be reflected—even unintentionally—in the instruction provided by such teachers.

Furthermore, the arrangement may provoke some controversy, as noted in *Lemon,* between the auxiliary teachers and the religious authority over the precise meaning and extent of the legislative restraints. See *Lemon v. Kurtzman, supra,* 403 U. S. at 619, 91 S. Ct. 2105." 358 F. Supp. 29 at page 40.

The majority of the District Court recognized that warnings to the teachers and assurances by them would not satisfy the requirements of the Establishment Clause, or it would not have invalidated that part of Act 195 as permitted the furnishing of some instruction equipment.

The school administrators and teachers called by the interveners all testified that they had been warned repeatedly about introducing religious content into the "auxiliary" services program or using equipment and materials supplied under Act 195 for religious purposes. This demonstrates one aspect of the entanglement involved in the situation. For instance, in questioning Sister Mary Dennis Donovan, Coordinator of Human Relations Education for the parochial schools of Pittsburgh, Mr. Ball elicited the following responses:

"Q. Now, Sister, are you a member of a Roman Catholic teaching order?

"A. I am.

"Q. What is the name of the order?

"A. I belong to the Sisters of St. Joseph of Baden, Pennsylvania.

"Q. Is it your understanding that there are legal restraints on these Acts with respect to religious inculcation?

"A. Definitely.

"Q. How did you come to know about these restraints?

> "A. Well, we have repeated and very emphatic directives given to us in regular meetings—I would say the administrative staff and the principals meet with our superintendent, John Chico and the coordinators of Governments on an average of ~~one~~ once every two months, and I don't believe we have had a meeting where this hasn't been emphasized."

It is obvious that the parties involved in implementing the acts recognize the potential for unconstitutional conduct on the part of those who carry out the programs. Secondly, it shows unlawful entanglement by the government in religion. Public officials are directing the administration of parochial schools through periodically scheduled meetings.

> "It places the State astride a sectarian school and gives it power to dictate what is or is not secular, what is or is not religious." Justice Douglas, concurring in *Lemon v. Kurtzman*, 403 U. S. at 637.

Defendants' brief points out that the Intermediate Units must abide by the nondiscriminatory hiring provisions of 24 P. S. § 1-108, which provides:

> "No religious or political test or qualification shall be required for any director, visitor, superintendent, teacher, or other officer, appointee, or employee in the public schools of this Commonwealth."

We submit that this provision simply complicates the problem. There is nothing to prevent the Units from hiring personnel of the same religious affiliation as the schools being served. It would seem highly likely that people who wanted to serve in religious schools would apply for the positions available for providing auxiliary services in the schools of their denomination.

As a matter of fact, it had come to the attention of counsel for appellants that in some cases employees who provided auxiliary services in parochial schools prior to the passage of Act 194 were simply transferred from the parochial school payrolls to the payrolls of the Intermediate Units. As a result, appellants propounded the following interrogatory to the defendants:

> "11.(a) State whether any of the persons employed by Defendants or the Intermediate Units to provide auxiliary services were previously employed by the nonpublic schools to which they are assigned." Defendants answered the interrogatory as follows: "Interrogatory No. 11:
>
> (a) There are some situations where this does exist."[3]

In other words, in at least some cases Act 194 is being used to relieve the non-public schools of the expense of paying the personnel who were employed by them prior to the passage of the act.

4. The Evidence Supports Appellants' Position That the Acts Have a Primary Purpose of Aiding Religion and Involve the State in Prohibited Entanglement with Religion.

In the counterstatement of the case contained in the brief of appellees Jose Diaz et al., it is stated that it is both denied and unproved that most of the schools eligible for benefits under the acts have religiously restrictive admissions and faculty appointment policies, imposed attendance at religious instructions and worship, and have religious restrictions on what the faculty may teach. Similar statements are contained in the briefs of the other appellees.

3. R 1.

Appellants called Robert J. Czekoski, the Coordinator of Non-Public School services for the Pennsylvania Department of Education, who stated that no nonpublic school was barred from receiving benefits under the acts by reason of the fact that it is controlled by a religious organization, has as its purpose the teaching, propagation or promoting of a particular religious faith, imposes religious restrictions on admissions, requires attendance at religious instruction, imposes religious restrictions on faculty appointments or imposes religious restrictions on what the faculty may teach. The only test applied by the Department for qualification for benefits is that the school must fulfill the compulsory attendance requirements of the state. (A44-A49).

On page 161 of the transcript of the proceedings before the lower court (R. 161) the following colloquy appears:

> "JUDGE GIBBONS: Mr. Ball, before you begin, if you will turn to the answers to interrogatories, Interrogatory No. 1, Answer 1(c), a list of schools submitted by school superintendents of the several Roman Catholic Dioceses in Pennsylvania contains the names of 968 schools which are Roman Catholic Diocesan schools. For purposes of this action may we take it as established that those 968 schools at least of the 1320 involved in this program have a religious purpose?
>
> "MR. BALL: Yes, that can be taken for granted, yes, your Honor.
>
> "JUDGE GIBBONS: Does the Commonwealth so concede?
>
> "MR. BLEWITT: Yes, Your Honor."

The religious mission of Roman Catholic Schools is thus conceded, and it is a well known fact of which the Court should take notice.

This case should not be decided in a vacuum. The schools involved in this case are the same ones involved in *Lemon v. Kurtzman, supra,* and *Sloan v. Lemon, supra.* Reference to those cases provide additional statistics and information concerning the nature of church schools in Pennsylvania and the percentage of students attending such schools.

5. Conclusion.

The sum and substance of Act 194 is that the Intermediate Units are paying educational personnel to go into religious and private schools to perform services which the appellees' own witnesses characterize as part of a modern well-staffed educational program. Under Act 195 the Intermediate Units are buying textbooks, instructional equipment and materials and placing them in sectarian schools, thereby relieving the schools of the expense of obtaining them. The primary effect of the acts is self-evident.

Finally, the acts themselves and the Guidelines adopted for the administration of the acts provide abundant evidence of far more government entanglement in religion than was found in the *Lemon* cases and in the *Nyquist* [4] case.

Respectfully submitted,

WILLIAM P. THORN,
LEO PFEFFER,
Attorneys for Appellants.

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4. *Committee for Public Education and Religious Liberty v. Nyquist,* 413 U. S. 756 (1973).